NO. 82-403

IN THE

SUPREME COURT

OF THE

UNITED STATES

OCTOBER TERM, 1982

COUGAR BUSINESS OWNERS ASSOCIATION, et al.,

Petitioners,

v.

STATE OF WASHINGTON; DIXIE LEE RAY, Governor; JOHN DOE ONE and JOHN DOE TWO,

Respondents.

On Certiorari from the Supreme Court

of the State of Washington

BRIEF IN OPPOSITION TO
PETITION FOR CERTIORARI

KENNETH O. EIKENBERRY
Attorney General
Scott C. Neilson
Assistant Attorney General
Temple of Justice
Olympia, WA 98504
Telephone: (206) 459-6600

Attorneys for Respondents

TABLE OF CONIENTS

		Page
I.	FACTS AND PRIOR PROCEEDINGS....	1
II.	SUMMARY OF PETITIONER'S ARGUMENTS.....	3
III.	ARGUMENTS AGAINST GRANTING CERTIORARI.....	5
	A. The state court's decision did not address heretofore undecided issues of federal law and was not in conflict with applicable decisions of other courts.	5
	B. Petitioners' due process rights have not been violated by the Governor's restricting public access to the town of Cougar.	12
	C. Petitioners have not been denied their rights to procedural due process.	14
IV.	SUMMARY.....	16

TABLE OF AUTHORITIES

Page

Table of Cases

Boyd v. Commonwealth, 215 S.E.2d 915 (Va. 1975)..... 10, 11

Cougar Business Owners Ass'n v. Washington, 97 Wn.2d 466, ____P.2d ____ (1982)..... 2, 14, 15

Euclid v. Ambler Realty, 272 U.S. 365 (1926)..... 13

Goldblatt v. Hempstead, 369 U.S. 590 (1962)..... 13

Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 300 (1981)..... 13

Moyer v. Peabody, 212 U.S. 78, 85 (1909)..... 9

Shelley v. Kraemer, 334 U.S. 1 (1948)..... 16

Sterling v. Constantin, 287 U.S. 378, 399-400 (1932)..... 7, 8, 9

Valdez v. Black, 446 F.2d 1071, 1076-1077 (10th Cir. 1971)..... 9

Other Authorities

	Page
Constitutional and Statutory Bases of Governor's Emergency Powers, 64 Mich. L. Rev. 290 (1956)	10
1969 Sen. J. 41st Legis. Wash. at 1066	15
U.S. Sup. Ct. R. 17	6, 7
42 U.S.C. § 1983	3

NO. 82-403

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1982

COUGAR BUSINESS OWNERS ASSOCIATION, et al.,

Petitioners,

v.

STATE OF WASHINGTON; DIXIE LEE RAY, Governor; JOHN DOE ONE and JOHN DOE TWO,

Respondents.

On Certiorari from the Supreme Court of the State of Washington

---

PETITION FOR CERTIORARI

I. FACTS AND PRIOR PROCEEDINGS

Petitioners, property owners in the town of Cougar, Washington, seek damages for economic losses suffered to their

businesses after former Governor Dixy Lee Ray included their town in a restricted zone around Mt. St. Helens during its eruptive activity between April-October, 1980.

A summary of the sequence of events which are subject matter of this law suit appears in the Washington State Supreme Court's opinion in this case. Cougar Business Owners Ass'n v. State, 97 Wn.2d 466, ___ P.2d ___ (1982); See Petition for Certiorari, Appendix A. At the time of the challenged decisions the nature and extent of the threat posed by Mt. St. Helens was largely unknown. Id. 97 Wn.2d at 469-471; Petition, Appendix at A-4--A-5.

Petitioners brought suit for money damages against the State of Washington, Governor Ray and two unnamed individuals

after the restrictions had been lifted. The Washington Supreme Court upheld a summary judgment granted in favor of defendants. The court held that the Governor's actions were authorized by statute, entirely discretionary and, therefore, immune from suit. The court also ruled that the Governor's actions failed to constitute a taking of property without compensation and that no liability for her actions could be established under 42 U.S.C. § 1983.

II. SUMMARY OF PETITIONERS' ARGUMENTS

Arguments for granting certiorari rests heavily upon claims that the Washington court has erroneously interpreted State law. Petitioners claim that state statutes restrict the exercise of the Governor's emergency

powers to situations where events of a specified nature have actually resulted in some property damage or loss of life. They further claim the statutes require an end to emergency measures sooner than it occurred in the case.

The state court refused to accept this narrow view of when emergency powers may be exercised, pointing out that under this interpretation:

> The Governor would have had no power to act before the actual eruption to save lives or property. In other words, nothing of a preventive nature could have been done. Such a contention is contrary to the legislative intent of the statutes on which the Governor's actions were based.

97 Wn.2d at 475; Petition, Appendix at A-14.

Petitioners claim this is wrong and has resulted in a denial of their rights to due process guaranteed by the federal

Constitution. This interpretation is said to permit arbitrary actions by the Governor with no recourse for persons damaged thereby. The state court noted that an action in mandamus would be available to challenge unlawful exercise of executive emergency powers, but the Cougar Business Owners failed to make use of the remedy. Petitioners now claim it would have been futile to bring such an action, and argue they have been effectively denied their right to have the Governor's actions reviewed. Petition at 19.

III. ARGUMENTS AGAINST GRANTING CERTIORARI

A. The state court's decision did not address heretofore undecided issues of federal law and was not in conflict with applicable decisions of other courts.

Petitioners seek discretionary review of the denial of their right to

recover damages for Governor Ray's actions. U.S. Sup. Ct. R. 17 provides:

> 1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.
>
> . . .
>
> (b) When a state court of last resort has decided a federal question in a way in conflict with a decision of another state court of last result or of a federal court of appeals.
>
> (c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court or has decided a federal question in a way in conflict with applicable decisions of

this Court.

. . .

The United States Supreme Court has long recognized the broad authority of a chief executive to take necessary measures in times of emergency. Because the precise nature of an impending emergency cannot be predicted in advance and because effective response must depend upon quick action with less than complete information, the Washington court was correct in refusing to define the executive emergency powers narrowly. This decision was wholly in keeping with existing Supreme Court authority.

As stated in Sterling v. Constantin, 287 U.S. 378, 399-400 (1932):

> By virtue of his duty to "cause the laws to be faithfully executed," the Executive is appropriately

vested with the discretion to determine whether an exigency requiring military aid for that purpose has arisen. His decision to that effect is conclusive. That construction, this Court has said, in speaking of the power constitutionally conferred by the Congress upon the President to call the militia to actual service, "necessarily results in the nature of the power itself, and from the manifest object contemplated." The power "is to be exercised upon sudden emergencies, upon great occasions of state, and under circumstances which may be vital to the existence of the Union." (Citing authority.) Similar effect, for corresponding reasons, is ascribed to the exercise by the Governor of a state of his discretion in calling out its military forces to suppress insurrection and disorder. (Citing authorities.) The nature of the power also necessarily implies that there is permitted range of honest judgment as to the measures to be taken in meeting force with force, in suppressing violence and restoring order, for without such liberty to make immediate decisions. the power itself would be useless. Such

> measures, conceived in good faith, in the face of the emergency and directly related to the quelling of the disorder or prevention of its continuance, fall within the discretion of the Executive in the exercise of his authority to maintain peace. [Emphasis supplied.]

See also Moyer v. Peabody, 212 U.S. 78, 85 (1909). Moyer and Sterling continue to be viable authority for the exercise of a Governor's emergency powers. See Valdez v. Black, 446 F.2d 1071, 1076-1077 (10th Cir. 1971).

Petitioners have cited no cases in which the position of another state court of last resort or a federal court of appeals is in conflict with the Washington decision. Rather, courts and legislatures have generally recognized the need to provide for a chief executive's prompt, effective response to emergencies of all kinds:

> In times of natural catastrophy or civil disorder, immediate and decisive action by some component of state government is essential. The legislative police power can of course be exercised to deal with crises affecting the public health, safety, and welfare. In practice, however, the ravages of nature and exigencies of rioting, labor strife, and civil rights emergencies usually necessitate prompt governmental response. Since the executive is inherently better able than the legislature to provide this immediate response, the state chief executives have frequently been given substantial discretionary authority in the form of emergency powers to deal with anticipated crises. Consequently, when public emergencies arise, the center of governmental response is usually the Governor's office.

Comment, Constitutional and Statutory Bases of Governor's Emergency Powers, 64 Mich. L. Rev. 290 (1956).

For example, in Boyd

v. Commonwealth, 215 S.E.2d 915 (Va. 1975), the court was unwilling to restrictively interpret a similar state law. In Boyd, as in this case, the disaster was not a single incident but rather a temporary condition which existed over a period of time.

The United States Supreme Court should not take on the task of defining or limiting a state chief executive's emergency powers and circumstances justifying use of these powers. There is no indication of substantial controversy among jurisdictions on these issues. Nor is there any indication that the various state statutes have yet been subject to judicial interpretation in the applicable state courts. Absent this showing, especially since no important issues of federal law are

presented, certiorari should not be granted.

B. Petitioners' due process rights have not been violated by the Governor's restricting public access to the town of Cougar.

The Petition for Certiorari states at page 15:

> The governor's action, however, was an improper exercise of police power and violated Petitioners' due process rights protected by federal and state constitutions.

It is not altogether clear whether petitioners are claiming that their rights to "procedural" or "substantive" due process are infringed. Although the Constitution protects individuals right to own, use, and enjoy property, the Supreme Court has long recognized that government can regulate or restrict the use of private property in its exercise of its police power without requiring

payment of compensation. The analysis applied is whether the exercise of police power is "reasonable". Hodel v. Virginia Surface Mining and Reclamation Ass'n, 452 U.S. 264, 300 (1981); Goldblatt v. Hempstead, 369 U.S. 590 (1962); Euclid v. Ambler Realty, 272 U.S. 365 (1926).

In the instant case, petitioners' economic interest in keeping their businesses open to the public must give way to the important interest of the government in emergency regulation to protect against loss of life and property in a potential disaster situation. In view of the fact the Governor exercised her best judgment after consultation with experts and that no one could predict when or what Mt. St. Helens would do, the Governor's

actions were reasonable. Cougar Business Owners Ass'n v. State, 97 Wn.2d at 469-470; Petition, Appendix at A-4--A-6. Furthermore, the Governor's affidavit describing the actions taken and the reasons therefore was uncontroverted by petitioners.

Petitioners have not, and cannot, make the requisite showing that the Washington court's decision is in conflict with other authorities.

C. Petitioners have not been denied their rights to procedural due process.

Petitioners claim that the Washington court's decision leaves persons aggrieved by a Governor's exercise of emergency powers without remedy. The legislative history of the Emergency Powers Act makes clear that the remedy for citizens aggrieved by a Governor's declaration of an emergency

is an action in the State Supreme Court for a writ of mandamus of prohibition. 1969 Sen.J. 41st Legis. Wash. at 1066.

Petitioners never attempted to have any of the Governor's decisions concerning Cougar reviewed under this procedure. Cougar Business Owners Ass'n v. State, 97 Wn.2d at 471; Petition, Appendix at A-6. They argue instead that such action would have been futile because the Governor's decision to call out the state militia is by statute, "final, incontrovertible and unimpeachable." In fact, there is no reason to believe the Washington Court would consider itself powerless to prevent truly arbitrary and unreasonable actions of a chief executive.

The United States Supreme Court should not pass upon whether a remedy

would or would not have been effective when the remedy was never used by petitioners and, in fact, petitioners have left unchallenged the Governor's affidavit establishing the necessity and reasonableness of her acts.

Review of the appended decision will reveal that petitioners failed to raise federal Constitutional issues for the state court concerning the adequacy of the mandamus remedy. Thus, this issue should not be addressed by this Court. Shelley v. Kraemer, 334 U.S. 1 (1948).

IV. SUMMARY

The Petition for Certiorari should be denied. Petitioners are seeking review of issues of state law touching important powers of the state chief

executive. There has been no showing that the Washington court's decision is in conflict with Supreme Court or other authority. It is not violative of due process to take reasonable steps to protect life and property threatened by a natural disaster. The reasonableness of measures prescribed by Governor Ray was established in her affidavit and was unchallenged by petitioners.

Federal law does not entitle petitioner to money damages under the facts of this case when the highest state court has eld no such remedy available under state law. This does not mean persons are left with no recourse against future arbitrary and unreasonable exercise of emergency powers. Rights to procedural due process are protected by the

availability of a writ of mandamus or prohibition in the courts, a remedy never pursued by petitioners in this case.

DATED this 30th day of September, 1982.

Respectfully submitted,

KENNETH O. EIKENBERRY
Attorney General

SCOTT C. NEILSON
Assistant Attorney General
Attorneys for Respondent